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Nuclear War: The End of Law

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Abstract

Professor Miller summons us to consider the constitutionality of nuclear weapons. In doing so, he has made an original, provocative contribution to constitutional jurisprudence as well as the humanizing politics of nuclear arms control. He speaks with scholarly responsibility on a subject that has heretofore engendered either silence or nonsense and bombast.

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Introduction

By raising the question about the constitutionality of nuclear weapons, Professor Miller augments understanding of constitutional law and how constitutional law is done. Constitutional lawyers take far too crabbed a view of their subject when they merely sift through past court decisions and speculate on how the Supreme Court might decide a case in future. Consideration of the legality of nuclear arms leads Professor Miller to point out that the constitution is not limited to what the Court has said or may say. It includes, he reminds us, the great political realities which are brought partially to textual expression in the preamble and which can be fully satisfied not by judicial opinions but only by the people's decisions and actions and by the operations of all our institutions. To begin with, then, nuclear war violates constitutional law in the Miller dimension, which embraces systemic justice and the fundamental nature of government by the people.¹

Equally enlarging is Professor Miller's introduction of arguments drawn from specific constitutional provisions. First he exhumes and gives life to the doctrine of delegation, not presently favored in federal

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1. It is to be remembered that Abraham Lincoln characteristically referred to the Declaration of Independence rather than to the Constitution when he addressed the fundamental nature of the American people.

litigation and not before given such expansive, refreshing expression.² Article 1, section 8, clause 2 commits to Congress the power to declare war. Presidents, acting without such congressional declarations have, from time to time, authorized responsive, limited military action. Professor Miller proposes that, because limits cannot be maintained once nuclear weapons are employed, Congress may not delegate decisions about their use to the President or to computers and glitches.³

Second, having called attention to the restrictions of delegation, Professor Miller takes note of its responsibilities. Congress may not fail to exercise the powers delegated to it by the constitution. Article I, section 8, clause 10 grants to Congress the power to punish offenses against the law of nations. Accordingly, says Professor Miller, Congress must combat the international crime of threatened or contemplated use of nuclear weapons.⁴

Third, the President has an affirmative constitutional duty similar to that imposed upon Congress. Article II, section 3 directs the chief executive to "take care that the laws be faithfully executed." The word "laws" comprehends international law by implication, analogy or necessity, and so places the President under a duty matching that of Congress. He, too, must act to remove the forbidden threat of nuclear

2. Pre-1937 decisions of the Supreme Court occasionally relied upon the doctrine of non-delegation of legislative powers in striking down actions of Congress. *See, e.g., A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935). More recently, the Court has avoided invocation of the doctrine by the device of narrow construction of a tested delegation. *See, e.g., Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976). For a judicial expression of interest in resurrecting the doctrine see *Industrial Union v. American Petroleum Inst.*, 448 U.S. 607 (1980). The doctrine of non-delegation has found a readier audience in state courts where it appears to be alive and well. *See, e.g., Howell v. State*, 238 Ga. 95, 230 S.E.2d 853 (1976).

3. There is a prior question here about whether Congress itself has the power to declare nuclear war. *See infra* p. 61. If war ever had a human scale, that possibility has grown increasingly remote since the beginning of World War I when technology was let loose relentlessly to grind human life and human flesh.

4. I have reservations about this argument. It may be that legislatures are designed, mercifully, exactly to do nothing. *See, e.g., R. NEELY, HOW COURTS GOVERN AMERICA* 47-78 (1981). Perhaps the only affirmative duty of Congress that we may safely press is that of the oath of office to support the Constitution (art. VI, § 3). To cite but one example, I think it best that the congressional power to declare war not be viewed as carrying with it an affirmative duty. We want no zealous exercises of that power.

arms.⁵

Last, Professor Miller argues that the due process clause places upon all three branches the requirement actively to prevent nuclear deprivation of life, liberty and property.⁶ He then ends as he began: he challenges lawyers to take up the problem of nuclear weapons because it is a matter of law for lawyers, not some distant activity above and beyond the calling of the bar.

The Constitutional Aspects of Nuclear Weapons

If my views diverge from Professor Miller's at certain points, the variance should not be misinterpreted. I wish to pay tribute to him and to do so by heeding his call to speak. How better to express thanks than to do exactly as he urges and take up the debate?

Professor Miller offers his essay as a preliminary exploration of possibilities. My response is in kind. I want to raise some questions about the agenda for discussion of the constitutionality of nuclear weapons.

5. This argument has several steps. There must be an affirmative duty; international law must be included in this duty; nuclear weapons must be a violation of international law; the Court must have power to declare the duty. I do not think the argument unworthy of pursuit. But each of its elements will have to be established, and I do not think that an easy task.

6. Such a federal police power might be seen as having two components: an affirmative duty abroad to labor for mutual disarmament and a domestic self-policing duty not to do those things which may trigger nuclear war.

Perhaps the growing interest in an expansion of the public trust doctrine might afford a preferred ground upon which to build the desired affirmative duty.

It is also to be asked if the affirmative duty of government might not include some form of unilateral disarmament. Professor Miller says that his essay is not a plea for selective unilateral disarmament. I would like at least to reserve judgment on the issue of unilateral disarmament. On the one hand, I can imagine a type of selective unilateral disarmament that might be plain, good military policy and actually strengthen our defense posture. On the other hand, as Professor Miller points out, ideas may appear foolish only because they are new and challenge received ways of thinking. Miller, *Nuclear Weapons and Constitutional Law*, 7 NOVA L.J. 21 (1982).

A. Unconstitutional: Is the Characterization of Nuclear Weapons as Constitutional Adequate?

Fear and befuddlement prevent action. If we are so afraid of the bomb that we suffer ethical paralysis or are so overwhelmed by the claimed complexities of disarmament that we cannot grasp them, then the arms race will run on toward the finish of nuclear apocalypse. Professor Miller cuts the dragon down to size. He gives us hope. He shows us that we can take action, can process the dragon into links of sausage. This is a very lawyerlike approach. It encourages lawyers to understand that nuclear war is something that they can and should prevent. We are enabled to subject the bomb to arguments about constitutional validity the way lawyers reduce any volatile issue to manageable parts bearing blackletter labels.

This is a good and commendable undertaking. Nevertheless there is considerable risk in initiating a dialogue about the legality of nuclear arms. Lawyers suffer a vocational disadvantage in this regard not shared by their colleagues in the medical profession. When a physician describes the effects of a nuclear attack — massive death, mutilated bodies, unbearable suffering, endless contamination — we are horror struck.⁷ None but a madman would argue that nuclear war is healthy.

7. Physicians are as diverse in their political and social views as any other large group of citizens and rarely speak in unison on matters of public policy. But today they are virtually united in their effort to convey a simple, urgent message about nuclear war to the American public and the Administration. The message is this: Nuclear war—any kind of nuclear war—would cause death and suffering on a scale never seen before in all of history, and modern medicine with all its skills could do little or nothing to help. . . .

Most physicians are convinced that nuclear war is the greatest threat to health and survival that society has ever faced. It would indeed be the 'final epidemic,' for which medicine has no treatment. When there exists no cure for a disease, the only course is to take preventive measures. That is why physicians believe it is their professional responsibility to urge their fellow citizens and their Government to make certain that nuclear weapons are never used. Unlike natural catastrophes, over which man has no control, nuclear war would be a disaster of man's making. It should be preventable.

Realm & Leaf, *Doctors: No Rx's In a War*, N.Y. Times, Aug. 11, 1982, at A23, col. 1.

Not so when our political rather than physical constitution is the subject. No sooner does one lawyer argue that nuclear weapons are not constitutional than another lawyer ventures the counter-argument that they are constitutional.⁸ Arguments on both sides of *any* issue are our professional stock-in-trade. To introduce the subject of nuclear weapons into such argumentation is to take the chance that this exercise may, against our deepest wishes, lend nuclear weapons an unwarranted air of legitimacy.⁹ Quite apart from any authoritative decision, lawyers' arguments might domesticate the nuclear issue, remove its urgency as well as its terror, and make it, catastrophically, familiar.

Nuclear weapons are monstrous. They may also be illegal. But we dare not lose sight of their unnatural monstrosity. Of course lawyers should address prevention of nuclear war. The assignment is to keep the blasphemy of nuclear war clearly in focus at the same time that we find means for lawyers to reckon with it in lawyerlike ways.

Instead of talking about the unconstitutionality of nuclear weapons, would we not be better advised to describe them as deconstitution-alizing or anti-constitutional?

Professor Miller's own comments — about nuclear war's destruction of underlying values — indicate how we might proceed. Like doctors we would attempt to depict the aftermath of nuclear war. But,

8. The arguments in favor of constitutionality are easily imaginable: preambular citation of the need for common defense, Article I delegation of the powers to raise and support armies and to provide for the common defense, Article II delegation of certain foreign affairs responsibilities and of command of the armed forces, Articles III limitations of judicial review, etc.

9. Undeniably, nuclear weapons exist. But that certainly does not mean that they are legitimate. Professor Miller refers to an "assumption of constitutionality" of nuclear weapons. Miller, *supra* note 6, at 22. I am not prepared to make or grant that assumption.

Secretary of Energy, James B. Edwards, not only assumes the legitimacy of nuclear weapons but celebrates them. In an unparalleled display of callousness—or was it cynicism?—Secretary Edwards said that he found "exciting" a nuclear bomb exploded on the eve of the anniversary of the bombing of Hiroshima. "*Cabinet Officer says U.S. will continue Atom Arms Testing*," N.Y. Times, Aug. 6, 1982, at 1, col. 1. Secretary Edwards seems to regard nuclear arms as an adjunct of the first amendment: the nuclear bomb "is the weapon that can preserve their ability for free political discussion." *Id.* at B4, col. 6. It is an alarming point of view and helps to indicate why I wish to overthrow the ideological statement that we live in a Hobbesian world. See *infra* note 10.

instead of taking up the medical consequences, we would address the legal consequences.

For example: What would become of western legal order? Would there be a legal system? How would it function? Would there be government? Would there be courts? What of police? What would happen to the practice of law? Would there be law schools left? What would legal education become when all the major law schools in major urban target areas had been destroyed? And what of democratic government? Is it not likely that any surviving remnant would find abhorrent and reject our way of life and Constitution that had permitted this thing to happen?¹⁰

These are the kinds of questions that might be taken up and debated if we realized that nuclear weapons are de-constitutionalizing. We would be asked to portray those things known to us as lawyers that would be lost. Lawyerly argument would then be stripped of its potential to legitimate nuclear weapons for the arguments would proceed from the premise of destruction. The subject for debate would be not whether nuclear weapons are legal, but rather, the extent to which they destroy law and lawyers.

10. Professor Miller says that we live in a Hobbesian world. Miller, *supra* note 6, at 24. I disagree for two reasons. First, a Hobbesian world is what we would have *after* nuclear war. Hobbes' account is sobering:

In such condition, there is no place for industry; because the fruit thereof is uncertain: and consequently no culture of the earth; no navigation, nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving, and removing, such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish and short.

T. HOBBS, *LEVIATHAN* 100 (M. Oakeshott ed. 1962). That is a pretty fair description of a post-nuclear war world, not the one we have now, and it serves to help us understand what we would lose.

The second reason for disagreeing with the statement that we live in a Hobbesian world is this: We are made to believe that we live in a Hobbesian world through propaganda and ideology, and it is a kind of self-fulfilling prophecy. We need desperately to find a more satisfactory description for reality, one that would not lead us to accept as rational the self-contradictory statement that we must have nuclear arms if we are to survive.

B. Decision-Makers: The Nuclear Problem as an Opportunity for Popular Revolution.

Professor Miller, with his strategy of hope, points out that nuclear weapons present us with an opportunity. He makes of them an opportunity for broadening and deepening our conception of constitutional jurisprudence and for heightening our sense of legal ethics. May there not be another opportunity in the making, opportunity for a kind of positive democratic revolution?

Thomas Jefferson had thought that liberty in America might be enriched by a revolution every generation. Nuclear arms may provide occasion for this generation's revolution if the growing disarmament movement among the people continues.¹¹

Professor Miller makes reference to those who have authority and control in the government and their duty to take action. And he says that lawyers are no longer on the sidelines because they have quasi-governmental status and a share in the action. This is to accept the fact of government by an elite and to say that lawyers have some attachment to that elite.

The problem of truly popular government is one that we have not solved. We have done a more or less satisfactory job of providing government of and for the people. We do not provide government by the people. Periodic elections, polls and interest groups are means of bringing influence to bear upon government. They are not a participation in government. The nearest thing the people have to a place within government is the street — marches and rallies before the United Nations, below the Washington monument, etc. The street is not a satisfactory forum for the formation and expression of opinion.

It is in this sense that nuclear weapons and the people's movement to control them offers a governmental opportunity, the opportunity to think about and explore government by the people.

President Eisenhower pointed to the gap between what the government is planning and doing and what the people are dreaming and hoping. He said that the people want peace so much that one day govern-

11. Letter from Thomas Jefferson to W. S. Smith (Nov. 13, 1787) in *THE PAPERS OF THOMAS JEFFERSON* 356-57 (J. Boyd ed. 1955). *See also* *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 488, 492, 674-75, 714 (A. Koch & W. Peden eds. 1944).

ments "had better get out of their way and let them have it."¹² We keep reciting the refrain that in this government the people are sovereign. If the people are indeed the governors as well as the governed, then they and not an elite should be the decision-makers with the duty to act. Perhaps the issue of nuclear arms control will bring the day for piercing the veil of rhetoric and reaching the reality of popular government. At least we are given the opportunity to consider it.

Lawyers have a critical role to play in the democratic governing of affairs, especially nuclear affairs.¹³ They have this role not because of ties to a governing elite but because of their original ties to the people. If we have governmental status with responsibility to act, then this is so because as officers of the court we have a singular duty in generally-shared citizenship.

With respect to the nuclear disarmament opportunity, lawyers might wish to reflect upon and develop juridical means for giving expression to what the people are dreaming and hoping. We might also wish to consider whether conceptions of how to train lawyers in the skills of representation have been too narrowly confined. Legal representation of the people may entail something altogether different from (and in addition to) courtroom advocacy, negotiation, drafting, etc. Would this be subject matter for a professional skills course? Constitutional law? Some other? As a minimum, lawyers ought to be asked to devise, for a matter as urgent and immediate as nuclear war, a more efficacious mode of participation than polls, litigation, demonstrations, or a letter to one's congressman. (The force of such a letter is fully spent in triggering a machine-extruded standard-form response bearing a machine-impressed signature.)

C. Process: Are the Procedures Leading Up To and Resulting From Nuclear War Constitutional?

Professor Miller observes that constitutionalism in the United

12. D. EISENHOWER, *THE QUOTABLE DWIGHT D. EISENHOWER* 55 (1967); B. COOK, *THE DECLASSIFIED EISENHOWER* 149 (1981) (quoting a statement of Eisenhower to Harold Macmillan in a televised talk, London (Sept. 6, 1959)).

13. I am a member of the Lawyer's Alliance for Nuclear Arms Control. I do not represent or speak for this organization. My opinions led me to join this group; my membership did not lead me to hold these opinions.

States is more than process, i.e. law has normative content. This may well be true. But are there not procedural issues yet to be fully exploited?

(1) If we project the aftermath of a hypothetical nuclear war (assuming there would be an aftermath), the barren legal landscape exhibits several procedural features. One of these is the absence of appeal or recourse.

In *Nixon v. Fitzgerald*,¹⁴ the Supreme Court held that the President is absolutely immune from damage suits for actions taken in connection with official duty. Writing for the Court, Justice Powell averred that the Court had not placed the President above the law.¹⁵ He said that the possibility that the President was above the law was a chilling but unjustified contention.¹⁶ He said that it was unjustified because there remains the remedy of impeachment.¹⁷ Regardless of what one thinks about *Nixon v. Fitzgerald*, it does help us to see the chilling fact that nuclear war would put the President above the law, and above politics for that matter. There would be no legal or political redress. Impeachment would have no materiality or relevance. Elections, if they were ever held again, would not recall the devastation.

We can see that Congress cannot delegate to the President such an unlimited power. But then we can also see that Congress cannot exercise this power either. In fact, the real reason that Congress cannot delegate this power is that it does not have such a power. The essence of constitutionalism, says Professor Miller is limited government. Article I of the Constitution does not contain the grant of unlimited power. When we committed to Congress the power to declare war, we did not grant the power to declare Armageddon. There would be no appeal from such a declaration. We have given neither the President nor the Congress the right to use unbounded violence or violence without legal and political control. Self-destruction, if it is a right, is one retained by the people.

(2) If we start with nuclear war and think back rather than beyond, we find other procedural issues. For example, what is the process

14. 50 U.S.L.W. 4797 (U.S. June 24, 1982).

15. *Id.* at 4804 & n.41.

16. *Id.* at 4804 n.41.

17. *Id.* at 4804.

by which nuclear war comes about? Research on this subject by constitutional scholars could be divided into two phases: one from the present back to the origin of the nuclear possibility; the other forward to a projected hypothetical nuclear war.

With respect to phase one: How has today's situation come to be? Through what processes was our policy or lack of policy given shape? What defaults in constitutional process does this history expose? With respect to phase two: What exactly are the procedures by which nuclear war happens? Do these procedures entail nuclear war, or do faulty procedures allow nuclear strikes to take place in constitutionally suspect ways? (I hazard the guess that secrecy in these areas — such as chains of command — has far less legitimate scope than we are led to suppose.)

(3) If there are procedural arguments and procedural research remaining to be pursued, are there not also procedural actions to be considered? In addition to debating the subject, what ought lawyers do? What judicial, political or other steps should we take? For a start, would it not be lawyerlike to press for the procedural device of requiring impact statements detailing the effects of nuclear war and the arms race upon the environment?

Conclusion

Professor Miller's essay precipitates a final, unresolved thought: What if nuclear weapons are constitutional and nuclear war is legal? What might that reveal to us about our constitution? About our legal-political system? About ourselves? All the answers within range of my powers of vision appear utterly joyless. Ultimate honesty compels us to face those answers howsoever bitterly we may rue their content.¹⁸

18. Such honesty would be the contemporary form of repentance. As such, it would not be easily accomplished. One of the difficulties is the way in which people use God. As George Kennan has noted, during this century's world wars, both sides appealed to God for support of their military efforts. Kennan, *A Christian View of the Arms Race*, THEOLOGY TODAY 162, 170 (July, 1982). Howsoever questionable "this combination of religious faith and secular chauvinism . . . in those past instances" and howsoever it may appear that "modern military technology has now created conditions which allow only one (godly) answer to the possibility of a Soviet-American war," *Id.* I believe that history offers every reason to suppose that some people will nevertheless

appeal to God in support of even nuclear arms. There has long been an intimate involvement of religion in both American constitutionalism and warfare. This is neither the place nor the forum for trying to confront that controversial, complicated involvement. However, these matters are an issue in the question of the constitutionality of nuclear weapons. Suffice it to say here that the honesty necessary to face the answers to the questions posed in the text seems to me available only in the context of the biblical faith. But I also believe that the biblical tradition is to be understood by us in non-religious terms. As Dietrich Bonhoeffer proposed: "Man's religiosity makes him look in his distress to the power of God in the world: God is *deus ex machina*. The bible directs man to God's powerlessness and suffering; only the suffering God can help." D. BONHOEFFER, *LETTERS AND PAPERS FROM PRISON* 197 (E. Bethge ed. 1967). A *deus ex machina* is the ally of nuclear weaponry; the suffering God is the ally of its victims. (My own attempts at a theological understanding of law, first addressed in M. BALL, *THE PROMISE OF AMERICAN LAW* (1981), are the subject for continued exploration in another book now in progress.)